Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

DIALYSIS CLINIC, INC.,

Petitioner,

v.

NELLIE FRY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer's managing agent can raise an inference of employment discrimination solely by comparing her treatment to the treatment of a younger male who was not a manager and whom she supervised. Specifically, whether a managing agent, who was terminated for her violations of a medical records policy which she issued and which she had responsibility to enforce, may use as her "comparator" for discrimination purposes, a younger, male, hourly employee, who had no managerial responsibility, whose misconduct involved a different employer policy, and whose discipline was in part approved by the plaintiff managing agent herself.

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Dialysis Clinic, Inc. ("DCI"), a not-for-profit Tennessee corporation. DCI states that it is not a publicly traded corporation, that it has no parent corporation, and that there are no publicly traded corporations which own 10 percent or more of DCI.

Respondent: Nellie Fry ("Fry"), an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dialysis Clinic, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

This is an employment discrimination case in which a managing agent of DCI's Wilkinsburg, Pennsylvania facility alleges age and sex discrimination due to her termination from employment for violating DCI's medical records policy, a

policy which she had issued and had responsibility to enforce.

After the District Court for the Western District of Pennsylvania granted in part and denied in part DCI's motion for summary judgment (App. 29a), the matter was tried before a jury on June 26-30, 2000. The District Court entered judgment for Fry based upon a jury verdict. (App. 17a). DCI timely appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit Court of Appeals affirmed by Order and Opinion of August 30, 2001, which is reported at 2001 U.S. App. LEXIS 20092 (3rd Cir. August 30, 2001). (App. 14a). DCI timely filed a request for rehearing and for rehearing *en banc,* which was denied by Order entered on October 16, 2001. (App. 32a).

JURISDICTION

The court of appeals entered its judgment on August 30, 2001. Petitioner timely filed a petition for rehearing and for rehearing *en banc* on September 13, 2001. On October 16, 2001, the court of appeals issued its decision and order denying petitioner's petition for panel rehearing and rehearing *en banc.* (App. 32a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of 29 U.S.C. § 623 (hereinafter referred to as "ADEA") and 42 U.S.C. § 2000e (hereinafter referred to as "Title VII") are set forth at p. 33a of the Appendix.

STATEMENT OF THE CASE

This employment discrimination case originally was brought in the United States District Court for the Western District of Pennsylvania under 42 U.S.C. § 2000e and 29 U.S.C. § 623, and federal jurisdiction exists under 28 U.S.C. § 1331.

A. General Background and Description

Fry is the former managing agent of DCI's Wilkinsburg clinic, where she was the Clinical Supervisor. On July 30, 1996, DCI learned that Fry admittedly had created a false medical chart after she previously had been instructed some weeks prior to correct a false entry she had made on that same patient's medical chart. DCI also learned that Fry could not produce the original medical chart which contained her first false entry. Fry was terminated for violation of DCI's medical records policy, a policy which Fry had issued and had ultimate responsibility to enforce.

Fry sued alleging that her termination was age and sex discrimination. Fry was replaced as Clinical Supervisor by an older female, Nancy Moskyok. Fry has admitted in these proceedings that she could not establish a *prima facie* case of age or sex discrimination other than by comparing her termination to the treatment of a younger male employee, and Fry has attempted to establish a *prima facie* case of age and sex discrimination *solely* on that basis. The younger male whom Fry claims as a comparator is a younger male machine technician, Alan Shearer, whom Fry supervised and whose discipline Fry occasionally approved. DCI submits that, as a matter of law, Fry and Shearer are not "similarly situated" and cannot be adequate comparators. Since the differing treatment

of Fry and Shearer is not sufficient to raise an inference of age and sex discrimination, and since Fry admittedly has no other manner by which to establish a *prima facie* case, DCI is entitled to judgment as a matter of law.

DCI is a not-for-profit corporation which provides dialysis treatment to patients with kidney disease. DCI operates stand-alone dialysis treatment facilities, such as the Wilkinsburg clinic where Fry was the Clinical Supervisor. Patients generally receive dialysis three days a week, and if they miss two or more scheduled consecutive treatments, their health could be threatened. DCI's clinics are subject to periodic audits by governmental licensing authorities, who inspect patient medical charts and other medical records.

In 1993, DCI hired Fry, who at that time was 50 years old, as the Clinical Supervisor of DCI's clinic in Wilkinsburg, Pennsylvania ("the Wilkinsburg clinic"). As Clinical Supervisor, Fry was the managing agent of DCI at the Wilkinsburg clinic as the senior day-to-day management official assigned to that clinic. Ms. Fry supervised, either directly or indirectly through subordinate supervisors, every other DCI employee assigned to work at the Wilkinsburg clinic on a daily basis. Ms. Fry was charged with enforcement of all of DCI's policies, including the medical records policy, which she issued for the Wilkinsburg clinic.

Fry's supervisor was David Chabal, an Administrator assigned responsibility for three DCI clinics, including the Wilkinsburg clinic. Chabal's office, however, was not at the Wilkinsburg clinic but rather at another DCI clinic located in North Hills, near Pittsburgh, Pennsylvania.

Fry alleges that DCI discriminated against her on the basis of her age and sex because, although she was terminated,

a younger male machine technician who backdated an entry on a water treatment log was merely written up and given probation. Fry further submits that Shearer's past record of numerous disciplinary infractions shows that he should have been terminated, too, or, that Fry should have been treated equally and given some lesser discipline than terminati n.

When Fry and Shearer were disciplined in July 1996, Shearer was an hourly paid machine technician who reported to the Chief Technician at the Wilkinsburg clinic. Fry supervised Shearer's boss, the Chief Technician. Shearer had no supervisory authority and had no responsibility for drafting, issuing or enforcing any DCI policies. The policy violation for which Shearer was disciplined did not involve a medical record and did not involve any policy which Shearer had any managerial responsibility to enforce. Throughout Shearer's employment, Fry had managerial responsibility for all employees at the clinic, including Shearer, and Fry approved and "signed off on" many of Shearer's past disciplinary infractions.

B. Fry's Termination

On Wednesday, July 10, 1996, Nancy Moskyok, a nurse at the Wilkinsburg clinic, and Lori Peterle, a nurse practitioner who worked for Medical Director Stephen Cooksey, reviewed a patient's medical chart and discovered that the patient had missed scheduled treatments on July 3 (Wednesday), 5 (Friday), and 8 (Monday). The medical chart contained a record of DCI employees' attempts to contact the patient on both July 3 and 8, but there was no notation indicating any such attempt to contact the patient on Friday, July 5, 1996.

Later that same Wednesday afternoon, the same two nurses noted that Fry had made an entry on the record as follows:

> 7-5-96 pt a no-show for treatment today No answer at pt home N.Fry RN.

The nurses noted that this appeared to be a back-dated record, and they also noted that Fry had not worked at all on Friday, July 5. Chabal was then notified of these concerns.

On the following day, Chabal reviewed with Fry several concerns regarding her job performance, including the apparent false entry of Friday July 5 on the patient's medical record. Chabal had confirmed that Fry did not work at all on Friday, July 5, and could not have called the patient on that day, as Fry had noted on the patient's chart. Fry explained that, although her entry was not correct, she had merely made a mistake on the date, that she had actually worked on Saturday, July 6, and that she had made the call on that day.

Chabal accepted Fry's explanation, but he explained that if she made another such false entry, she would be terminated. Chabal then instructed Fry to correct the progress note to reflect the correct date of her call to the patient.

Approximately two weeks later, Chabal again learned of a problem with the same patient's record. Chabal learned that the original progress note -- the one with Fry's July 5 entry -- was missing, that the entire patient progress note had been rewritten, and that, on the rewritten progress note, Fry's name did not appear, her initials did not appear, and there was no record on the rewritten progress note of Fry's call to the patient on Saturday, July 6.

Chabal investigated. Chabal then called David Hagewood, the Director of Human Resources for DCI (whose office is in Nashville, Tennessee) to explain that Fry appeared to have made a false entry on the progress note, had been told to correct the entry, had rewritten the note entirely without any entry from her, and now the original record with the initial false entry was missing.

Hagewood directed Chabal to take the following action: (1) if Fry could not produce the original medical record, Chabal was to terminate her; (2) if Fry had the original record, Chabal was to place her on a second written warning with probation. After this conversation, Chabal met with Fry. Fry had no explanation for her failure to make an entry for Saturday, July 6, and she could not produce the original medical record.[1] As instructed by Hagewood, Chabal told Fry that she was terminated.

DCI policy (as adopted and publicized by Fry herself) expressly charges the Clinical Supervisor with responsibility for the patients' medical records and expressly prohibits DCI staff from leaving records where they could be accessed by unauthorized personnel. Furthermore, the policy provides that, except on court order, original medical records may not be removed from the premises and instead must be maintained in areas secure from loss, destruction or unauthorized access at all times. DCI's strict records policy is directly resultant of its need to provide quality patient care and the numerous regulatory requirements with regard to the maintenance of medical records. DCI requires all original medical records to

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[1] Chabal testified, and his notes reflect, that Fry told him that she had thrown the original away. Fry disputes that testimony and says that she told Chabal she threw it on the Nurse Manager's desk.

be maintained for the purpose of periodic reviews by governmental inspectors who insist on seeing originals of all medical records and who raise questions when they note inaccuracies or the absence of an original record. Fry does not dispute that such inspections occur.

Fry was terminated for falsification and destruction of a medical record. Chabal did not discuss Fry's age with Hagewood, and Hagewood did not know her age. Chabal promoted an older female to replace Fry as the Clinical Supervisor. Following Fry's discharge and prior to her filing a charge of discrimination with the EEOC, Jeffrey Gaines, a younger male nurse at the Wilkinsburg clinic, was discharged, pursuant to DCI's policies and procedures, for writing someone else's initials on a patient's medical record as having completed certain procedures on the patient.

C. Shearer's Disciplinary Action

On July 29, 1996, the Chief Technician at the Wilkinsburg clinic noticed that Shearer failed to enter water test values on the water treatment log. The next day, July 30, the supervisor noticed that Shearer had written down water test values for July 29, essentially backdating the test results on the water treatment log by one day. When Chabal learned of Shearer's action, he confronted Shearer and then consulted Hagewood. Chabal explained to Hagewood that Shearer claimed to have conducted the test on the 29th but had simply forgotten to write down the water test results, so he wrote the results on July 30 for the test he had conducted on the 29th. Hagewood instructed Chabal to take the following steps: (1) Have another water values test run immediately; (2) if the results of the second test were "markedly different," Chabal should terminate Shearer because Hagewood believed such "markedly different" results would indicate that Shearer was

lying about what had happened; however, if the results were not "markedly different" (confirming to Hagewood that Shearer likely performed the test but merely back-dated the values by one day), Chabal was to place Shearer on a written warning and give him one year probation.

Chabal conducted another test, and the results were substantially the same. According to Hagewood's instructions, Chabal placed Shearer on written warning and gave him one year probation.

In the conversation with Hagewood, Chabal did not review Shearer's performance history, did not discuss Shearer's age with Hagewood, and Hagewood did not know Shearer's age. According to DCI's medical records policy, a medical record includes a patient's progress notes but does not include water treatment logs.

D. District Court's Holding

In its summary judgment motion, and in its renewed motion for judgment as a matter of law at the close of all proof, DCI argued that, as a matter of law, Fry could not establish a *prima facie* case of discrimination under either the ADEA or Title VII because the only means by which she was attempting to raise such an inference was the comparison of her treatment to the treatment of Shearer and that she and Shearer were not adequate comparators. The District Court in each instance ruled that Fry had created a jury issue on whether Fry and Shearer were adequate comparators. (App. 24a). The Court submitted that issue to the jury in its instructions. The jury ruled that Fry established that she and Shearer were adequate comparators, and it found, as a result, that DCI intentionally discriminated against Fry on the basis of her age and sex. (App. 17a).

E. Third Circuit's Opinion

The Third Circuit ruled that Fry could establish a *prima facie* case of age and sex discrimination by using Shearer as a comparator. (App. 9a-10a). The Court held that, because DCI does not have a separate set of rules by which it assesses the conduct of its managers, there was sufficient evidence to present a jury question on whether Shearer was "similarly situated" to be an adequate comparator.[2] (App. 9a). The Third Circuit further ruled that there was evidence by which the jury could determine that Shearer's misconduct was comparably serious to Fry's infraction. (*Id.*). On that basis, the Third Circuit determined that Fry could use Shearer as a comparator. (*Id.*).

In its ruling, the Third Circuit did not discuss or attempt to distinguish any of the contrary holdings of other Circuit Courts of Appeal, nor did it discuss or even attempt to distinguish this Court's rulings that employers face increased exposure for conduct of its managers in sex discrimination/sexual harassment matters.

At its core, this case rests upon whether Shearer as a matter of law can be an adequate comparator. In at least three other Courts of Appeal, he could not. If Shearer is not an adequate comparator, Fry cannot establish a *prima facie* case of discrimination under either the ADEA or Title VII, and Fry's claims must be dismissed.

The Third Circuit later denied DCI's petition for rehearing and for rehearing *en banc*. (App. 32a).

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[2] The Third Circuit did not discuss the fact that DCI had a medical records policy, separate from its Rules of Conduct in its handbook, which also reflects disciplinary measures, and that Fry herself issued that policy.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH CASES OF THIS COURT.

The Third Circuit decided an important question of federal law in a way that conflicts with the decisions of this Court, and this Court should grant this petition on that basis. R.10(c), Rules of the Supreme Court of the United States. In the standards relative to Title VII/sexual harassment claims, this Court has instructed all federal courts to assess the burden of proof and liability imposed upon an employer as singularly dependent upon whether the person alleged to have engaged in the misconduct is a manager. If a manager has engaged in the misconduct, the employer is strictly liable unless it has available and can establish an affirmative defense. If a non–manager has engaged in the misconduct, the plaintiff bears the burden of proof and liability depends upon a different standard. *See generally Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). Thus, under Title VII/sexual harassment, the burden of proof and liability consequences differ depending solely upon whether the alleged harasser is a manager or mere co-worker.

Yet, according to the Third Circuit, the differing treatment of a manager and a non-manager -- for violations of different policies -- can infer sex and age discrimination because these employees are similarly situated under the very same provision of the very same law (Title VII's prohibition of sex discrimination).

The Third Circuit's decision fails to mention the Supreme Court's rulings in *Faragher* and *Ellerth*, even though

those cases establish that the entire framework of Title VII's prohibition of sex discrimination differs depending upon whether the allegedly offending employee is a manager. This distinction rests upon the fact that a manager is an agent of the employer, while a non-manager is not. The employer is saddled with this distinction in proof and liability because of its identity with the alleged manager/harasser, even if the employer's sexual harassment policy prohibits harassment by all employees.

Here, however, the Third Circuit's decision allows a manager, as a potential employment discrimination plaintiff, to turn the stricter standards required of employers by this Court's rulings into a weapon of alleged discrimination. For example, if an employer learns in an investigation that a manager has verbally harassed a subordinate, this Court's precedent would imply that the employer needs to take severe action, such as suspension or termination, for the manager's abuse of the authority to which he was entrusted and which authority identifies the employer as the manager and vice-versa. If the terminated manager then learns of a non-manager who had merely been warned (but not suspended or terminated) for similar misconduct, that manager, under Third Circuit precedent, could claim discrimination on the basis of whatever demographics of the manager (age, race or sex) differed from the non-manager employee. Indeed, as discussed in more detail *infra*, a manager conceivably could create her own comparator by not consistently enforcing an employer's policies against non-management employees and thereby safeguard her own potential claim.

Fry was the manager and agent in charge of enforcing the very policy which she violated. Fry's conduct, as Clinical Supervisor, had significantly different implications for DCI

than did Shearer's conduct. Fry had responsibility for supervising the clinic, for maintaining the clinic's medical records, and for enforcement of the medical records policy. Fry was DCI's agent, and her misconduct within the scope of her agency could impute liability to DCI in a manner that the actions of Shearer could not. As a matter of law, DCI's potential liability differed significantly as between the actions of Fry and Shearer and, as such, DCI held Fry to a higher standard than Shearer. Shearer cannot, therefore, be an adequate comparator for Fry.

This Court has recognized these realities as controlling in the enforcement of Title VII's prohibition against sex discrimination. However, the Third Circuit never mentioned this Court's rulings in *Faragher* and *Ellerth*. In essence, under the Third Circuit's decision, an employer must either articulate a different set of policies for all of its managers' conduct, or it must not take more severe action against a manager than it takes against a non-manager, even though the manager's conduct has far greater implications for the employer. If an employer does take more severe action against the manager, and if the demographics of the manager differ from a subordinate who was treated less harshly, the employee can then use this differing treatment as a potential weapon.

In light of the holdings of *Faragher* and *Ellerth*, DCI's exposure under Title VII is greater for the actions of its agents, like Ms. Fry, than for the actions of its non-managerial staff. The Third Circuit, however, undermines this directive with its requirement of a "same size fits all" disciplinary scheme for all employees, regardless of title, when an employer has a single set of rules applicable to all employees. The conflict between the Third Circuit's decision and the rulings of this Court is obvious and must be remedied.

Other Circuits have elaborated on this body of law. *In Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994), the Sixth Circuit noted that the actions of a supervisor, as an "agent" of the company, could impute liability to the company regardless of whether the company had any knowledge of the action. *Pierce*, 40 F.3d at 803-04. However, a non-agent employee's conduct will only impute liability if the employer "knew or should have known" about it.

The Seventh and Tenth Circuits also confirm the necessity of this differentiation. *See Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905 at *15-16 (10th Cir. November 5, 2001)("An employer who entrusts greater responsibility to its supervisors than to ordinary employees surely can be expected to exact greater responsibility from them."); *Hoffman v. MCA, Inc.*, 144 F.3d. 1117, 1124 (7th Cir. 1998)("MCA could reasonably expect a higher level of professionalism from [its Vice President] than it could expect from less experienced and lower-ranking sales representatives."). Clearly, courts make the distinction between the two groups, so naturally, it follows that responsible employers should do the same. In the instant case, DCI has every right to expect more from Fry than from an employee like Shearer. By virtue of her title alone, Fry's actions have far more severe implications for DCI.

This Court has mandated differing analyses for adjudging the acts of supervisors and those of lower level employees. The Third Circuit failed to give credence to this established distinction when it held that Fry and Shearer were sufficiently similarly situated to make DCI's dissimilar treatment of them inferential of age and sex discrimination. For this reason the Court should grant certiorari.

II. THE THIRD CIRCUIT'S DECISION THAT A MANAGING AGENT IS SIMILARLY SITUATED IN ALL RELEVANT RESPECTS TO AN HOURLY, NON-MANAGEMENT EMPLOYEE IS INCONSISTENT WITH OTHER APPELLATE COURTS THAT HAVE CONFRONTED THE ISSUE.

Establishing uniformity of federal doctrine is a core basis for the exercise of this Court's certiorari jurisdiction, and the circumstances of this petition clearly satisfy that fundamental criterion. See R. 10(a), Rules of the Supreme Court of the United States. There is a genuine conflict between the decision under review and decisions on the same issue by other federal appellate courts.

The Third Circuit's decision that an employer's managing agent (Fry) can establish a *prima facie* case by comparing her treatment to that of an hourly employee whom she supervises is inconsistent with rulings of the Sixth, Seventh and Tenth Circuit Courts of Appeals.[3] The ruling is even

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[3] *See Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) (This court held that to be similarly situated, a plaintiff must prove that "all of the relevant aspects of his employment" were "nearly identical" to that of the chosen comparator. Here, the court found that the plaintiff's status as supervisor and the comparator's status as an employee under his supervision rendered the two sufficiently dissimilar to permit the employer to take separate and more severe disciplinary action against the supervisor, although their misconduct was very similar); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1124 (7th Cir. 1998) (This court found the defendant employer not liable for alleged discrimination based on the plaintiff's (Vice President and Manager) attempt to compare the employer's treatment of him to that of a lower level employee, stating "MCA could reasonably expect a higher level of professionalism from Hoffman . . . than it could expect from less experienced and lower-ranking sales representatives."); *Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905 (10th Cir. November 5, 2001) (finding that a fire chief and fireman were not similarly situated for purposes

inconsistent with a Pennsylvania district court case, a decision which the Third Circuit affirmed without opinion.[4]

In order to infer unlawful discrimination from their differing treatment, the employment discrimination plaintiff and the individual to whom she compares herself must be similar in "all relevant respects." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994). Recent cases from outside the Third Circuit have treated the dissimilarity of a manager and a non-manager for this purpose as clearly established law: "Non-supervisory and supervisory employees cannot be deemed similarly situated . . . . The distinction between supervisors and non-supervisors is clearly relevant to whether we would expect the employees in this case to be treated the same in the absence of discrimination." *Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905, *15-16 (10th Cir. November 5, 2001). *See also Pierce, supra,* 40 F.3d at 802 ("[U]nlike the case of *supervisor* Pierce, the company would

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of employment discrimination, and thus that the City was correct in more severely disciplining the fire chief than the fireman for an altercation which occurred between both individuals.); *Jones, et. al v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000) (finding a supervisor and employee not similarly situated, thus justifying the less stringent punishment against the supervisor for her and the plaintiff's identical conduct).

[4] The district court stated that the plaintiff and the employee to whom she compared herself were not "remotely in similar situations,"as the other employee was "a junior faculty member undergoing tenure review, while [plaintiff] was a senior tenured faculty member and department Chair. *Brogan v. La Salle University*, 70 F.Supp. 2d 556, 566 (E.D. Pa. 1999), *aff'd*, 229 F.3d 1137 (3rd Cir. 2000)(*citing Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 802-03 (6th Cir. 1994). It is intriguing that, in the decision under review, the Third Circuit did not mention or even distinguish this case, apparently leaving employers within its jurisdiction to guess as to which standard applies.

have the opportunity to assess and remedy any sexual harassment complaints lodged against *non-supervisor* Kennedy before incurring liability. . . . Thus Pierce and Kennedy are not similarly situated employees.")(emphasis added); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1124 (7th Cir. 1998)("We cannot say that MCA's different treatment of less-experienced and lower ranking sales representatives means that MCA's proffered reason for firing [the Vice President] is pretextual.").

Fry, the day-to-day managing agent of the Wilkinsburg clinic who actually "signed off on" much of the discipline imposed upon Shearer, and Shearer, a non-agent, lower ranking hourly employee, are not similarly situated in *all* relevant aspects. In fact, they are not similarly situated in *any* relevant aspect except that both were employed by DCI at the same clinic. Such tenuous connection alone is not sufficient to create adequate comparators.

Shearer was a non-licensed, hourly paid, non-management machine technician who had no responsibility for, or even dealings with, patient progress notes or medical records. Shearer was responsible for entering data into a water treatment log, a DCI record that is not a medical record. Fry, on the other hand, was a licensed Registered Nurse and an exempt manager, the day-to-day managing agent of DCI responsible for the Wilkinsburg clinic. Fry was Shearer's indirect supervisor, and she signed off on several of Shearer's disciplinary actions.

Fry, as Clinical Supervisor, had ultimate responsibility for the maintenance of the clinic's medical records, the originals of which (and the accuracy of which) are required by governmental inspectors for compliance audits. Fry's conduct involved including false entries into both the new patient record and the missing original record. Unlike Shearer, Fry's conduct

violated the very policy she was entrusted to enforce to ensure compliance with governmental audits.

The implications of the Third Circuit's holding are far reaching. If this ruling stands, employers will be forced to treat their managers and low level employees equally in all aspects of discipline. Yet, one has supervisory authority, the other does not. One is entrusted to enforce company rules, which reasonably mandates a heightened obligation to follow them.

The Third Circuit undermines any such distinction. In that circuit, employees apparently can seek discovery of any and all employees at the employer organization, pick and choose a "comparator" regardless of status, title, or responsibility, to seek an instance of differing discipline and thereby establish an inference of discrimination. This logic essentially undermines the well-established rubric the of *McDonnell Douglas* tripartite analysis.

The Sixth, Seventh and Tenth Circuit Courts of Appeal have appreciated the material differences between a manager and a non-agent employee and have held accordingly. In the present case, Fry's conduct as supervisor had significantly different implications for DCI than did Shearer's. Clearly, the Third Circuit's ruling that these two individuals were similarly situated is in error and should be reversed.

The Third Circuit also erred in holding that employees can be considered similarly situated, for purposes of the employer's punishment of them, when their acts of misconduct are not comparable. This ruling is in conflict with the Sixth

Circuit and District of Columbia Circuit Courts of Appeals.[5] In fact, the District of Columbia Circuit actually states that individuals who are reprimanded by an employer cannot compare the severity of their reprimand to that of other employees if the acts preceding the punishment are not of "comparable seriousness." *Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999). DCI submits that "comparable seriousness" did not exist among Fry's and Shearer's conduct because Fry's conduct, by the very nature of her position with the company, becomes DCI's conduct. The Third Circuit, and Fry, ask that jurors be allowed to determine whether the violations of different company policies are of equal or greater seriousness when one of the employees who engages in the behavior is, by operation of law, the company itself and the other employee's behavior, by operation of law, is not. DCI even submits that the first point is improper in employment discrimination law because it asks a court or jury to assess the comparative seriousness of violations of different company policies. As a matter of law, such determinations are the province of business

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[5] See *Wellons v. Northwest Airlines, Inc.*, 2001 U.S. App. LEXIS 22580 (6th Cir. October 16, 2001) (finding that a plaintiff could not prove the racially discriminatory practices of her employer because she could not prove that she was similarly situated to two non-minority employees. The court found that the plaintiff had been disciplined for breaching the parties' collective bargaining agreement while the two comparators had not, thus meriting different measures of disciplinary action); *Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999) (finding that plaintiff could not adequately make out a prima facie case of employment discrimination when the individuals to whom she sought to compare herself had not committed acts of "comparable seriousness." More specifically, the plaintiff was suspended for "lying and blatant insubordination" while the two individuals to whom she compared herself were allowed to graduate, and one was reprimanded for being the "class clown" while the other admitted to "drinking and driving.")

judgment.[6] Even so, the second point is absurd; no reasonable jury could determine that a policy violation by a managing agent who can bind the company (particularly in these circumstances) can be as serious as a policy violation by a non-agent.

The Third Circuit's ruling mandates that, in imposing any discipline, an employer must assess what discipline it would impose if such misconduct were perpetrated by its highest officer at that particular location, and then impose that discipline on the person engaging in the conduct, regardless of their rank, title or responsibility. Otherwise, any employee who is reprimanded more harshly than another, even for a different (but subjectively believed more serious) offense, could establish the differing treatment (which was based upon different levels within the organization) as establishing actionable discrimination if by chance the demographics of the two comparators differed in some protected category. *McDonnell Douglas* and its requirement for an inference of discrimination requires more. Otherwise, its requirement of a *prima facie* showing will be eviscerated.

The Third Circuit's approval of the District Court's finding that Fry and Shearer are adequate comparators for purposes of proving a *prima facie* case of employment discrimination restricts an employer's liberty to expect and require higher standards of performance from its managers, and is thus in conflict with the Sixth, Seventh, and Tenth Circuits. Furthermore, a holding which allows two forms of misconduct, vastly different in severity because of its binding nature upon the employer, to be considered sufficiently similar so as to mandate the identical punishment of each wrongdoing

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[6] Such judgments are outside the scope of courts and juries, who do not sit as "super-personnel departments." *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999).

employee also, as the Sixth and D.C. Circuits have noted, unduly burdens each employer's autonomy to effectively manage its organization.

For these reasons, this Court should grant certiorari, or if it believes that the authorities are overwhelmingly one-sided, exercise its authority to summarily reverse the decision of the Third Circuit.

III. THIS CASE IS OF NATIONAL IMPORTANCE BECAUSE OF ITS PROFOUND NEGATIVE IMPACT ON AN EMPLOYER'S ABILITY TO EFFECTIVELY MANAGE ITS OPERATIONS.

The Third Circuit's ruling does far more than simply subject DCI, one employer, to liability that it does not deserve. It sets a precedent which allows disgruntled employees to successfully make claims of employment discrimination without first submitting any real evidence of disparate treatment. It essentially renders the *McDonnell Douglas* analysis extinct and ensures a significant onslaught (at least in the Third Circuit and others accepting its reasoning) of jury trials without first requiring some *prima facie* inference of discrimination.

The practical consequences of the Third Circuit's ruling are clear and daunting; its holding allows a manager to create her own comparator by refusing to fully enforce a company policy against subordinates that she may violate herself. For example, if a manager often was tardy, she could be lax in requiring enforcement of the company's tardiness policy against a younger male subordinate, and then, if she is reprimanded for tardiness, she could compare the company's treatment of her with her treatment of the younger subordinate

and argue the different responses constitute unlawful discrimination. Surely this sort of manipulation of the similarly situated analysis is not what the Court intended when it decided *McDonnell Douglas*.

This ruling also not only harms the employer, but it serves a great injustice to lower level employees. The very nature of non-agent employees' jobs subjects them to the supervision of the employer's agents. This ruling would allow an hourly employee who has been only slightly briefed on the employer policies and rules to be punished as severely as the supervisor who has not only been bathed in the knowledge of company policies, but who has also been entrusted to enforce them (and presumably paid for this duty). Managers are compensated at a higher level because employers depend on them, as their agents, to ensure that their subordinates are working efficiently and effectively. The assertion that managers and lower level employees are similarly situated in any way is suspect; moreover, the assertion that they are so situated in "all relevant aspects" is severely misguided.

The Third Circuit's ruling is of national importance because of its potentially crippling effect on the autonomy of employers to manage their businesses properly and efficiently. Perhaps even more troubling, under the Third Circuit's holding, lower paid employees could ultimately be forced to pay for the misconduct of their higher paid supervisors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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